No. 92-1915

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

YOUELL & COMPANIES AND
INSURANCE COMPANY OF NORTH AMERICA

Petitioners,

VS.

GETTY OIL COMPANY AND
TEXACO INC.,

Respondents.

On Writ of Certiorari to the Texas Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does it constitute a denial of due process of law under the 14th Amendment to the United States Constitution if a state court of last resort, on plaintiff's appeal of a grant of summary judgment for defendants, reverses and grants a *sua sponte* partial summary judgment in favor of the plaintiff, when:

(i) the denial of plaintiff's earlier motion for partial summary judgment was neither appealed *nor appealable*, so that it was not before the court;

(ii) defendants' responses to plaintiff's prior motion for partial summary judgment were not contained in the appellate record (because they were not relevant to the limited motion which was on appeal);

(iii) defendants were given no notice that plaintiff's motion for partial summary judgment would be considered by the court; and

(iv) defendants had no opportunity to present their defenses to plaintiff's motion before any appellate court, and will, as a result of the court's binding ruling, proceed to trial and final judgment without ever being afforded the opportunity to present their defenses on a critical issue?

LIST OF PARTIES

A. Petitioners:

(1) Youell & Companies, a consortium of offshore insurance companies and Lloyds syndicates consisting of Bermuda Fire and Marine Insurance Company, Limited; "Winterthur" Swiss Insurance Company, Limited; Compagnie Europeenne d'Assurances Industrielles S.A.; CNA Reinsurance of London, Ltd.; Lexington Insurance Company; British National Life Insurance Society, Ltd.; Lloyds syndicates Nos. 190, 210, 918, 989, 279, 650, 940; Sovereign Marine & General Insurance Company, Limited; Toyko Marine & Fire Insurance Company (U.K.), Limited; Taisho Marine & First Insurance Company (U.K.), Limited; Allianz International Insurance Company, Limited; Storebrand Insurance Company (U.K.), Limited; The Dominion Insurance Company, Limited; Stronghold Insurance Company, Limited; Folksam International Insurance Company (U.K.), Limited; Yasuda Fire & Marine Insurance Company (U.K.), Limited

(2) Insurance Company of North America

B. Respondents: Getty Oil Company and Texaco, Inc. (referred to herein as "Texaco")[1]

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[1] In the trial court, the plaintiff identified itself as "Getty Oil Corporation, succeeded by and a division of Texaco, Inc." There is some dispute below as to the identity of the proper party plaintiff, and any reference herein to "Texaco" shall be without any prejudice to the resolution of that issue. That dispute does not affect the deliberations of this Court.

C. Additional Parties Below: NL Industries, Inc.; Walbrook Insurance Company, Limited; El Paso Insurance Company, Limited; Dart Insurance Company, Limited; Louisville Insurance Company, Limited; Mutual Reinsurance Company, Limited

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REFERENCES TO PRIOR OPINIONS IN THIS CASE

The opinion of the Texas Supreme Court, issued on November 11, 1992, is reported in *Getty Oil Company and Texaco Inc. v. Insurance Company of North America, et al.*, 845 S.W.2d 794 (Tex. 1992). The Texas Supreme Court's opinion, judgment and order denying Petitioners' motion for rehearing are reprinted in Appendices A, B and C, respectively. The opinion of the Fourteenth Court of Appeals was reported in *Getty Oil Company and Texaco Inc. v. Insurance Company of North America, et al.*, 819 S.W.2d 908 (Tex. App.--Houston [14th Dist.] 1991), and is reprinted in Appendix D. The decision of the 280th District Court of Harris County, Texas is unpublished and is reprinted in Appendix E.

JURISDICTIONAL STATEMENT

The Texas Supreme Court initially issued its opinion on November 11, 1992, and denied Petitioners' Motion for Rehearing on March 3, 1993.

Pursuant to 28 U.S.C. § 2101 (c) and Supreme Court Rules 13.1, 13.4, Petitioners have applied for this writ of certiorari within ninety days after the Texas Supreme Court overruled Petitioners' motion for rehearing. Therefore, this Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION AT ISSUE

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

Texaco filed this lawsuit against NL Industries, Inc. ("NL") and its insurers, Insurance Company of North America and Youell and Companies, seeking to require them to pay the $14 million settlement of a wrongful death judgment rendered against "Getty Oil Corporation and Texaco, Inc." This lawsuit alleges the existence of a contract between Texaco's subsidiary Getty Oil Company and NL. A critical disputed issue was whether the alleged contract merely requires NL to carry insurance supporting its limited indemnity obligation or whether the insurance requirement is a separate obligation requiring NL to procure insurance covering the wrongful death claim.

The existence and interpretation of the alleged contract were the subject of a motion for partial summary judgment by Texaco, a motion for summary judgment by defendants, and a separate "mini-trial" in the trial court. No judgment was rendered at the conclusion of the mini-trial, but the trial court rendered a partial directed verdict that the purported contract lacked consideration. The trial court

denied Texaco's motion for partial summary judgment and granted defendants' motion for summary judgment.

Texaco appealed the grant of defendants' motion for summary judgment. Neither the denial of Texaco's motion for partial summary judgment nor the mini-trial ruling was at issue on appeal, nor could they have been under Texas procedure.[2] Texaco did not include defendants' responses to Texaco's motion for partial summary judgment in the appellate record, nor was any portion of the record from the mini-trial included in the record on appeal.[3]

The Texas Fourteenth Court of Appeals affirmed the summary judgment for defendants on *res judicata* grounds. The Texas Supreme Court affirmed again as to NL, but reversed the summary judgment as to Petitioners. Rather than limiting itself to a ruling that Petitioners failed to sustain their summary judgment burden, the Texas Supreme Court went on to hold: "[T]he additional insured provision of the contract does not support the indemnity agreement,

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[2] Texas procedure and case law are clear that denial of a motion for partial summary judgment is not appealable. *Rice v. English*, 742 S.W.2d 439, 444-46 (Tex. App.—Tyler, 1987, writ denied). NL objected when it appeared in the court of appeals that Texaco might be attempting to appeal the denial of its motion for partial summary judgment. In response, Texaco wrote: "NL says Getty and Texaco are appealing the denial of appellant's motion for summary judgment. . . . That is absurd." Consequently, it is beyond dispute that Texaco's motion for partial summary judgment was not before the appellate courts.

[3] Under Texas procedure, the burden is on the Appellant, Texaco, to see that a sufficient record is presented on appeal to show error requiring reversal. TEX. R. APP. P. 50(d).

but rather is a separate obligation. We disagree with the concurring and dissenting opinion that the contract is susceptible to any other reasonable interpretation." Thus, the Texas Supreme Court overstepped its bounds and effectively granted Texaco's motion for partial summary judgment.

The trial court's denial of Texaco's motion for partial summary judgment on that issue was *not* before the Texas Supreme Court. Petitioners' responses to Texaco's motion were *not* in the appellate record, Petitioners had *no* notice of the pendency of such motion and Petitioners had *no* opportunity to present arguments or evidence directed to that issue. The Texas Supreme Court thus had no possible way of determining whether viable defenses to Texaco's interpretation might exist. In fact, it has never been determined that a contract exists or that it applies to the underlying circumstances. Yet, summary judgment on this critical issue was granted for Texaco, *sua sponte*, by a judicial body that gave neither notice of its intention to consider Texaco's motion, nor an opportunity for Petitioners to be heard in opposition. The Texas Supreme Court's grant of summary judgment in favor of the non-moving party -- without any argument, evidence, or briefing in the record before it -- denied Petitioners the due process of law guaranteed by the United States Constitution.

Petitioners' constitutional rights were violated for the first time when the Texas Supreme Court issued its decision. Petitioners immediately moved for rehearing, challenging the grant of partial summary judgment in favor of the non-moving party upon appeal. *See* App. F. When violation of

a constitutional right to due process arises for the first time in a decision of a state supreme court, objection is timely made if raised on motion for rehearing. *Saunders v. Shaw*, 244 U.S. 317, 320 (1917). In Petitioners' motion for rehearing as supplemented, Petitioners properly objected to the lack of due process inherent in grant of summary judgment in favor the non-moving party. The Texas Supreme Court overruled the motion for rehearing without opinion.

The action of the Texas Supreme Court, if left unreviewed at this stage of the proceedings will, as a practical matter, permanently deprive Petitioners of a federal due process right. The trial court is bound by the ruling of the Texas Supreme Court as to the interpretation of the alleged contract, and must go forward on the issues remaining for trial on the unconstitutional premise of a partial summary judgment having been rendered against Petitioners without due process of law. The deprivation of Petitioners' due process rights will not "ripen" or develop by further trial proceedings in this matter; on the contrary, further proceedings below will only lend a permanence to the deprivation of due process, and the deprivation of due process will color all further trial proceedings and settlement negotiations in an insidious way. Practically viewed, failure to review this case at this stage would prevent any meaningful review.[4]

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[4] The requirement of finality should be given practical application, not a technical one. *See Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949); *Nebraska Press Assoc. v. Stuart*, 423 U.S. 1327 (1975).

ARGUMENT: Denial of Due Process

Petitioners' motion for summary judgment on the contract interpretation issue presented a narrowly-drawn argument that under Texas' "express negligence" rule, they should prevail on the bare language of the document at issue. *See Ethyl Corporation v. Daniel Constr. Co.*, 725 S.W.2d 705 (Tex. 1987). Petitioners' motion assumed, *arguendo*, that the document relied on by Texaco was a valid contract. It presented no extrinsic evidence as to the meaning of the document, and it accepted the language of the alleged contract in the light most favorable to Texaco, uncolored by course of performance, course of dealing, or usage of trade, and unencumbered by a multitude of related commercial documents. In fact, Petitioners chose not even to attempt to rebut Texaco's extrinsic evidence regarding the meaning of the alleged contract because, if the express negligence doctrine were applicable, such evidence would be neither relevant nor admissible.

The fact that those matters are not raised in Petitioners' motion for summary judgment does not mean that they do not exist. *See Prepo Corp. v. Pressure Can Corp.*, 234 F.2d 700, 703 (7th Cir. 1956), *cert. denied*, 352 U.S. 892 (1956); *Mingus Constructors, Inc. v. U.S.*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). In the absence of the express negligence doctrine, they are highly relevant to the interpretation of the document relied upon by Texaco, particularly in light of the trial court's thus far unchallenged ruling that the alleged contract lacks consideration and is only applicable, if at all, as part of a larger course of

dealing.[5] *See* TEX. BUS. & COM. CODE ANN. §§ 2.202, 2.207, 2.208 (Vernon 1968). *See also Harbor Insurance Company v. Lewis*, 562 F. Supp. 800 (E.D. Pa. 1983). Since such evidence was not relevant to Petitioner's motion, it was not before the Texas Supreme Court.

In making its *sua sponte* ruling in favor of Texaco, the Texas Supreme Court must have presumed, wrongly, that Petitioners had no defenses to Texaco's prior motion, because its ruling has effectively precluded all of Petitioners' defenses on the contract interpretation issue, depriving Petitioners of any procedural opportunity ever to raise these defenses in any forum. Because the Texas Supreme Court is the court of last resort in Texas, review by this Court is Petitioners' only avenue for redress. The Texas Supreme Court's ruling has not merely deprived Petitioners of an opportunity to be heard on these defenses "at a meaningful time and in a meaningful manner;" it has deprived Petitioners of any opportunity to present these defenses at all -- and it has done so without even having before it the information necessary to evaluate the nature or merits of the defenses.

For example, if Petitioners were unable to establish that the express negligence rule mandated their interpretation of the alleged contract, they could have presented an alternative argument that the document was ambiguous and

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[5] This Court need not address the substance of these contract defenses. The proper inquiry for due process purposes is merely whether an adequate opportunity to present the defenses was afforded. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84-87 (1988).

that its interpretation was a jury issue. For obvious reasons, Petitioners presented no such argument in their motion for summary judgment. Yet, even without the benefit of those arguments and supporting evidence, three dissenters on the Texas Supreme Court found the document to be ambiguous, and its interpretation to be a question for the jury. More members of the court might have reached the same conclusion if Petitioners had the opportunity to present their evidence and arguments on that issue. The point is, Petitioners never had that opportunity.

There is a vast difference, procedurally and substantively, between a ruling that Petitioners failed to sustain their summary judgment burden as to the interpretation of the alleged contract and a ruling that Texaco's opposing interpretation is correct as a matter of law. A movant on summary judgment must establish the absence of material facts *in light of its proposed legal interpretations*; however, this is not the same as admitting the absence of material facts *if its proposed legal interpretations are rejected*. *Prepo*, 234 F.2d at 703; *Mingus*, 812 F.2d at 1391 ("[B]y the filing of a motion a party concedes that no issue of fact exists under the theory he is advancing, but he does not thereby so concede that no issues remain in the event his adversary's theory is adopted.") Petitioners' motion was not required, and did not purport, to present every defense to Texaco's interpretation of the alleged contract. Thus, it is no answer for Texaco to argue that Petitioners' own motion for summary judgment involved interpretation of the contract.

Just as a trial court cannot grant a *sua sponte* summary judgment without notice and an opportunity for the parties to present all of their defenses, neither may an appellate court, in reviewing a summary judgment for one party, grant summary judgment for the other non-moving party without due process and an opportunity to be heard. *Fountain v. Filson*, 336 U.S. 681, 682-83 (1949).[4]

The rule in *Fountain v. Filson* is firmly grounded in principles of due process. The 14th Amendment to the United States Constitution forbids the exercise of judicial power without notice to the defendant and an opportunity to be heard. *Pennoyer v. Neff*, 95 U.S. 714, 732-33 (1878). Notice and an opportunity to be heard are required "even if the facts are clear." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985). And, of course, "the fundamental requirement of due process is to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). This is the reason a summary judgment proceeding requires "adequate procedural opportunity to oppose the motion." *White v. Texas American Bank/Galleria, N.A.*, 958 F.2d 80, 82-85 (5th Cir. 1992). *Accord Powell v. U.S.*, 849 F.2d 1576, 1579-82

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[4] *See* 10A Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 2720, at 34 (1983) ("[A]n appellate court should not reverse a summary judgment and order judgment for the nonmoving party on the basis of an issue that the movant had no opportunity to meet in the district court."); *and* 6 MOORE'S FEDERAL PRACTICE ¶ 56.12, at 156-169 (1992) ("[T]he appellate court should not order summary judgment for the non-moving party, but should remand for further development of the case, which may include the making of a motion for summary judgment by the prior non-moving party who prevailed on the appeal.")

(5th Cir. 1988) ("[T]he . . . court must give proper notice to insure that the nonmoving party had the opportunity to make every possible factual and legal argument"); *Western Fire Ins. Co. v. Copeland*, 786 F.2d 649, 652 (5th Cir. 1986) (purpose of summary judgment notice requirement is to afford a "reasonable and meaningful opportunity" to be heard); *Winbourne v. Eastern Air Lines, Inc.*, 632 F.2d 219, 223 (2d Cir. 1980) (party must be afforded the "due process protection specified in" the summary judgment rule).

The Court of Appeals for the Fifth Circuit has recognized that appellate courts sometimes err by going "too fast in making findings against" movants, thereby depriving movants of the necessary notice of possible findings against them. *Landry v. Air Line Pilots Association International AFL-CIO*, 901 F.2d 404, 437-38 (5th Cir. 1990), *cert. denied* 498 U.S. 895 (1990) (modification of opinion on motion for rehearing). In such a circumstance, the overreaching opinion should be limited by modification upon motion for rehearing. *Id.* The Texas Supreme Court did not take the opportunity on rehearing to modify its opinion, thereby finalizing the violation of Petitioners' due process rights.

Minimum federal constitutional standards must be observed under state practice rules. Indeed, in analyzing this case, this Court will note that the Texas Supreme Court has even violated its own rules of practice by granting summary judgment for the non-moving party.[7] Texaco *could*

[7] The propriety of the Texas Supreme Court's grant of summary judgment should be held to closer scrutiny than grant of a summary judgment in federal court. Texas law sets a higher standard for grant of

not have appealed the denial of its motion for partial summary judgment on the contract interpretation issue. *Rice v. English*, 742 S.W.2d at 444-46. It would be truly anomalous for Texaco to receive from the Texas Supreme Court, *sua sponte*, what it could not have received by expressly attempting to appeal the trial court's denial of its motion for summary judgment.

Petitioners' situation is reminiscent of, but worse than, the deprivation held to violate the 14th Amendment's guarantee of due process in *Armstrong v. Manzo*, 380 U.S. 545, 551-52 (1965). There, Armstrong was given the opportunity to present his defenses, but under circumstances which relieved the opposing party of its burden of proof and shifted the burden to Armstrong. This Court held that the shifting of the burden from what it would have been at trial violated Armstrong's right to due process. Similarly, here, the Texas Supreme Court has unacceptably altered the burdens of proof. Texaco would have had the burden of proving its case at trial against whatever defenses the Petitioners might have interposed. If neither side offered evidence, Texaco would not prevail, having failed in its burden. The Texas Supreme Court's ruling in Texaco's favor completely relieved Texaco of its burden to overcome those defenses, not merely by shifting the burden to Petitioners as in *Armstrong v. Manzo*, but by totally depriving Petitioners of any opportunity even to raise those defenses.

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summary judgment in its courts than does federal law. *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989); *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 n. 2 (Tex. 1988).

It also makes no difference to Petitioners' due process rights whether the defenses Petitioners may raise are ultimately held to be meritorious. At this stage, a substantive inquiry into the merits of Petitioners' defenses is not appropriate. *Procedural* due process is the paramount concern. In *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84-87 (1988), this Court held that a judgment rendered without constitutionally-mandated notice and an opportunity to be heard may not be permitted to stand and that consideration of the merits of any potential defenses was not a relevant inquiry. It makes no difference if the same judgment would be rendered on remand. It is the denial of the opportunity to be heard which constitutes the due process violation. *Id.* at 86-87.

CONCLUSION

In ruling without notice on the complex subject matter of a motion for summary judgment previously denied, and never appealed, and on which there was incomplete information in the record on appeal, the Texas Supreme Court violated mandatory procedural safeguards which resulted in Petitioners being deprived of any opportunity to present all their defenses to plaintiff's position. By so depriving Petitioners, the Texas Supreme Court has violated Petitioners' right to due process under the 14th Amendment of the United States Constitution. Accordingly, Petitioners

request that this Court grant a writ of certiorari to review the judgment of the Texas Supreme Court.

Respectfully submitted,

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